

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DANIEL DEVILLE,

Plaintiff,

vs.

CIVIL ACTION
No. 08-3076-SAC

ERIC MELGREN, et al.,

Defendants.

ORDER

Plaintiff, an inmate incarcerated in the United States Penitentiary in Leavenworth, Kansas (USPLVN), proceeds pro se on a civil complaint liberally construed by the court as seeking relief under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The court considers and decides the following motions.

Motion for Leave to Proceed In Forma Pauperis

Plaintiff has paid the initial partial filing fee assessed by the court under 28 U.S.C. § 1915(b)(1), and is granted leave to proceed in forma pauperis. Plaintiff's partial payments over time have fully satisfied the \$350.00 district court filing fee required in this matter, 28 U.S.C. § 1915(b)(1), thus no further collection from plaintiff's inmate trust fund account pursuant to 28 U.S.C. § 1915(b)(2) is necessary.

Motion for Leave to Amend the Complaint

In his initial pleading which was not submitted on a court approved complaint form, plaintiff alleged unlawful interference with his practice of his religion at USPLVN, and specifically sought preliminary injunctive relief which the court denied. The defendants identified in that pleading included USPLVN Warden Chester and USPLVN Supervisory Chaplain Crowell.

In January 2009, plaintiff submitted an amended complaint using a more regular complaint format, seeking injunctive relief and damages. The amended complaint names five defendants including defendants Chester and Crowell from the original complaint, and adds former USPLVN Warden Terrell, Bureau of Prisons (BOP) Regional Director Nalley, and BOP National Appeals Administrator Watts as defendants.

Pursuant to Rule 15(a)(1)(A) of the Federal Rules of Civil Procedure, plaintiff is entitled to amend his complaint "once as a matter of course" where he has not yet been served with defendants' response to the complaint. Plaintiff's motion for leave to amend the complaint is thus granted.¹

Motions for Appointment of Counsel and Service of Process

Plaintiff's motion for appointment of counsel is denied without

¹Plaintiff named then Assistant United States Attorney Eric Melgren as a defendant in his original pleading, but not in his amended complaint. Because the amended complaint supercedes and displaces the original complaint, the treats the amended complaint as encompassing plaintiff's voluntary dismissal of this party from the lawsuit. Fed.R.Civ.P. 15(a). See Murray v. Archambo, 132 F.3d 609, 612 (10th Cir. 1998)(amended complaint supercedes the original complaint).

prejudice. Because plaintiff is a prisoner, the court is required to screen the amended complaint and dismiss it or any portion thereof that is frivolous, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. § 1915A(a) and (b). Appointment of counsel is not warranted prior to the court's determination that a response by any defendant to any claim in the complaint is required.

Likewise, plaintiff's motion for service of process by the United States Marshal Service is denied without prejudice at this time. If the court determines a response to the amended complaint is required, the court is to issue and serve all process by the United States Marshal Service, at no cost to plaintiff absent a finding plaintiff is able to pay for the cost of such service. See 28 U.S.C. § 1915(d)(when a plaintiff proceeds in forma pauperis under § 1915, the court is to issue and serve all process); Fed.R.Civ.P. 4(c)(2)(providing for court appointment of U.S. Marshal Service to effect service when plaintiff proceeds in forma pauperis under 28 U.S.C. § 1915).

IT IS THEREFORE ORDERED that plaintiff's motion for leave to proceed in forma pauperis (Doc. 2) is granted, and that no further collection of the district court filing fee in this action is required pursuant to 28 U.S.C. § 1915(b)(2).

IT IS FURTHER ORDERED that plaintiff's motion for leave to amend the complaint (Doc. 6) is granted in that no leave of the court is required; that plaintiff's motion for an order compelling defendants to respond to the original complaint (Doc. 5) is denied

as moot; and that Eric Melgren, named as a defendant in the original complaint, is dismissed as a party in this action.

IT IS FURTHER ORDERED that plaintiff's motion for appointment of counsel (Doc. 7) and motion for service of process (Doc. 8) are denied without prejudice.

IT IS SO ORDERED.

DATED: This 9th day of September 2009 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge